102-3100-10568-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

David J. Wiley,
Petitioner,

vs.

Brooklyn Center
School District 286,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

This matter came before Frederic W. Knaak, Administrative Law Judge for hearing, pursuant to a referral by the Commissioner of Veterans Affairs under Minnesota Statutes Section 197.481, at 9:00 a.m. on Thursday, August 15, 1996, at the Office of Administrative Hearings, Suite 1700, 100 Washington Avenue South, Minneapolis, Minnesota. Post-hearing letter briefs and responses were submitted. The record was closed after receipt of the final brief argument on August 23, 1996.

Present at the hearing were the Petitioner, David J. Wiley, and his legal counsel David A. Singer, Esq., Suite 300, 3033 Excelsior Blvd., Minneapolis, Minnesota. Ms. Ann R. Goering, Esq., 300 Peavey Bldg., 730 Second Avenue South, Minneapolis, Minnesota, appeared representing the Respondent, Independent School District 286.

This Report is a *recommendation*, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained in this recommended decision. Pursuant to Minnesota Statutes Section 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this recommended decision to file exceptions and present argument to the Commissioner. Parties should contact Gerald Bender, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155-2079, telephone (612)297-5828, to determine the procedure to be followed for filing exceptions or presenting argument to this recommendation.

STATEMENT OF ISSUE

There are two issues central to the determination of this case:

1) Was the Petitioner "employed" and therefore, "discharged from employment" within the meaning of the Veteran's Preference Act?

2) If employed, for purposes of the Veterans' Preference Act, does the fact that the Petitioner was discharged because of the results of a required criminal history test preclude him from reinstatement or recovery?

FINDINGS OF FACT

1. The Petitioner is a qualified veteran within the meaning of the Veteran's Preference Act.

2. Under Minnesota law, the authority to hire and fire personnel by the Respondent Independent School District 286 is vested exclusively in its School Board.

3. The Respondent has a long-standing practice of hiring "substitute" employees to temporarily fill vacancies created by "regular" employees, until such time as the School Board acted to make them "regular" employees.

4. The decision to hire substitute employees is made by members of Respondent's administrative staff and is not reviewed or formally ratified by the School Board except in the case of substitute teachers employed for more than thirty days.

5. The Respondent has no written policy or practice that would otherwise limit the length or character of substitute employment within the District.

6. That, in cases in which permanent employment with the Respondent is contemplated, it was a practice followed in cases where immediate employment is considered necessary or desirable, to hire a person as a substitute until the School Board formally acted to employ that person as a permanent employee.

7. A position of "Stop and Learn" monitor became open in the Respondent school district in mid-January, 1996, as the result of an unexpected resignation of a school district employee.

8. The Petitioner, who was then employed by the Minneapolis school district, learned of the opening and applied for the vacant "Stop and Learn" position on January 22, 1995. Exhibit R5.

9. On January 30, 1996, Petitioner was one of three prospective hires for the position interviewed by a hiring committee of the Respondent consisting of Ms. Leslie Laub and Mr. Randy Koch, the Assistant Principal and Principal, respectively, of the Earle Brown Elementary School in which the vacancy had occurred. All three of the candidates were told at that time that a criminal history background check would be a requirement for employment in the open position. Petitioner signed a consent form authorizing the Respondent to obtain his criminal history record from the Minnesota Bureau of Criminal Apprehension. That form provided, in part, that Petitioner "authorize(d) the Minnesota Bureau of Criminal Apprehension to disclose criminal history record information to Independent School Distr. #286 Attn.: Ms. Schwint (sic) pursuant to Minnesota Statute 120.1045 for the purpose of employment as Elementary Prog. Disc. Supervisor with the School District." Exhibit R12.

10. At the time he signed the consent form, the Petitioner was aware that he had a criminal record for an arson-related conviction in 1972.

11. No one acting on behalf of the Respondent ever informed the Petitioner that any prior conviction or other matter found in the criminal background check could result in the Petitioner not being hired for the "Stop and Learn" position, or for his termination after hiring.

12. The Petitioner was informed by Ms. Loeb that he was the preferred candidate after the interview. He was advised by Ms. Loeb that she wanted him to start as soon as possible, and they agreed on a February 5, 1996, starting date. The Petitioner signed a "Part-time Employment" form of Respondent on February 1, 1996, that provided for 6.9 hours per day, 34.5 hours weekly up to a total of 524.4 hours of work. Exhibit R11. The Petitioner quit his job with his prior employer.

13. On February 5, the Petitioner began work for the Respondent as a "Stop and Learn" supervisor at the Earle Brown Elementary School. Including that day, he worked for 6.9 hours for each of six consecutive school days.

14. On February 12, 1996, Ms. Schwint, the designated recipient of the Petitioner's

criminal history record on behalf of Respondent, received a copy of that record from the Bureau of Criminal Apprehension that indicated that the Petitioner had been convicted in 1972 of an arson-related offense that had resulted in a five-year period of probationary supervision. Exhibit R13. Subsequently, this was clarified to establish that the Petitioner had been charged with Aggravated Arson, and pled guilty to a misdemeanor arson charge, with the sentence imposed stayed for five years. Exhibit R17.

15. Dr. Dennis Morrow, superintendent of the Respondent school district, was informed by Schwint of the result of the criminal history background check. Dr. Morrow directed Mr. Koch to inform the Petitioner that he would no longer be employed by the District and to leave the premises immediately. Koch gave Petitioner until the end of the work day on February 15, 1996 to leave.

16. The matter was taken up by the School Board of Respondent at its meeting on the evening of February 12, 1996. The minutes of that meeting state that the following action was taken: "The Administration of Independent School District No. 286 made a conditional job offer to a job applicant subject to: 1)acceptable results of a criminal background check; and 2) approval by the School Board. The applicant was allowed to perform services for the School District pending a decision by the School Board as to whether the applicant would be hired. The Board resolved not to hire the employee." Exhibit R14. The Board then authorized payment in an amount that Petitioner "would have received had (he) been employed by the School District while the services were being performed." Exhibit R14.

17. On February 15, 1996, the Petitioner wrote a letter to the Respondent demanding, among other things, a hearing, under the Veterans' Preference Act. In letters dated February 20, 1996 (Exhibit R15), and February 22, 1996 (Exhibit R19), the Respondent indicated that it was refusing to conduct such a hearing because: i) the Petitioner was never "hired" by the School Board and was not, therefore, "employed" under the Act; and ii) his hiring was conditioned on acceptable results of a criminal background check and the background check on his record had turned up an unacceptable conviction.

18. The Respondent had a previous experience, several years earlier, with an employee that had destroyed or significantly damaged one of its facilities by an act of arson. Respondent never informed Petitioner of this fact, nor that it would be considered in any employment-related decisions.

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter under Minnesota Statutes Sections 197.481 and 14.50.

2. The Petitioner and the Respondent received timely and proper notice of hearing before the Administrative Law Judge.

3. Petitioner is an honorably discharged veteran within the meaning of Minnesota Statutes Sections 197.455 and 197.46.

4. Respondent school district is a political subdivision of the State of Minnesota for purposes of Minnesota Statutes Sections 197.455 and 197.46.

5. The Respondent hired the Petitioner, and the Petitioner was employed by the Respondent, ***conditionally***, as a substitute employee, pending successful completion of a criminal background check pursuant to Minnesota Statutes Section 120.1045.

6. The consent form signed by Petitioner that specifically referenced Minnesota Statutes Section 120,1045 was sufficient notice under that Statute of the possibility, under Subdivision Two, that Petitioner's conditional employment could be terminated based on the result of a criminal background check.

7. The sole reason for the termination of the Petitioner's conditional employment with Respondent was the result of the criminal background check.

8, Although Petitioner had already begun performing services for the Petitioner, he was not "employed" by Petitioner for purposes of the Veterans' Preference Act, until all preconditions of acceptance of the offer of employment had been adequately accomplished, in this case including the satisfactory return and review of the criminal history background check.

9. Petitioner was conditionally hired, not "employed", and not "hired" as within the meaning of the statutory language. Therefor, he would not have been "terminated" under the provision of the Veteran's Performance Act. The language of Minnesota Statutes Section 120.1045, in particular, clearly precludes any liability on the part of the Respondent school district for its termination or failure to hire Petitioner in this case.

Based on the foregoing, the undersigned Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Department of Veterans Affairs dismiss Petitioner's appeal.

Dated: September 24, 1996

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Frederic W. Knaak
Administrative Law Judge

NOTICE

Pursuant to Minnesota Statute Section 14.62, subdivision 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped
No Transcript Prepared

MEMORANDUM

Under Minnesota Statutes Section 197.46, a school district employee who has been honorably discharged cannot be removed from his employment except for incompetency or misconduct shown after a hearing, upon due notice with charges stated in writing.

Here, there is no question about the veteran status of the Petitioner. What is contested is whether there was "employment" within the meaning of the statute. The Respondent school district is adamant in its assertion that the School Board has the exclusive legal authority under Minnesota Statutes Section 123.33, subd. 1, to hire personnel, which it has expressly delegated to no one else in the District. Since that Board not only did not hire the Petitioner, Respondent argues, but expressly voted not to hire him, he was never "hired" and, therefore, never "employed" by the District.

The argument might have had strength were it not for the admitted School District practice, testified to by Respondent's witnesses, of hiring substitutes on the direction of Respondent's administrative staff without prior School Board approval. In the testimony of the District's witness, Ms. Loeb, in particular, prior it was clear Respondent had hired the Petitioner as a substitute. No District policy was submitted that would testify to a duration of substitute employment for non-teachers. By the District's own admission, the Petitioner was at least a substitute employee in the Stop and Learn position and, therefore, employed.

Because Petitioner was, in fact, employed, the central issue in this matter becomes whether that employment was ***conditional*** , as permitted under Minnesota Statutes Section 120.1045 (the "Background Check statute"), and what that ***conditional*** status would mean after termination under the Veterans' Preference Act.

It's undisputed that the Petitioner knowingly signed a consent form for the criminal background check that the Background Check statute required the Respondent to implement. He recalled, as did Ms. Loeb, that he was told that this was a new procedure that Respondent was required to undergo. The form he signed noted the statutory cite of the Background Check statute. He was aware at the time of his earlier conviction and criminal record, but did not believe it would pose a problem. He did not ask anyone from the District at that time whether a conviction of the type he had would be a problem. The Respondent school district had, however, in that form, plainly notified the Petitioner of the nature and purpose of the background check, as well as its potential consequences. The statute does not place any additional burden on the Respondent school district beyond that simple notification.

In addition, Petitioner testified that he knew that the criminal history background check was considered a necessary element of his employment with the school district and that school district personnel were still awaiting the results after he began working for the school district. Both the testimony on behalf of both parties and the documented

evidence lead to the clear conclusion that the Petitioner's employment was conditioned

on the return of an acceptable criminal history background check.

Given the conditional employment, and the failure of the key condition, the language of the Background Check statute would appear to require a finding that the Respondent "not (be) liable for failing to hire or for terminating an individual's employment based on the result of a background check under this section." Since, in this instance, we are dealing with an individual whose employment was conditional, the decision by the School Board would be a "failure to hire", and not a "termination" under the provisions of the Veteran's Preference Act.

The Veterans' Preference Act (Minn. Stat. Sec. 197.46) requires a hearing in cases of removal or termination of employment. Minnesota Statutes Section 197.48 further provides that, in the event of a conflict, the provisions of a subsequent statute such as the Background Check statute cannot be construed as being inconsistent with the Veterans Preference Act, nor supersede the Veterans' Preference Act provisions unless it specifically states that intent (not so here).

If the action of the Respondent here were to be construed as a "termination" of the conditional employment of the Petitioner for purposes of the Veterans' Preference Act, it would lead to the patently absurd result of a veteran being "terminated" because of a discovered, pre-employment conviction, clearly the purpose of the Background Check statute, but then requiring that only the issues of incompetency or misconduct while conditionally employed be relevant to the hearing. This interpretation could readily lead under other facts to a situation where a school district, on learning that its conditionally hired teacher or playground supervisor had a prior record of child molestation or violent crime, could not "terminate" that "employee" because no "incompetency" or "misconduct" had occurred during the brief period of conditional employment.

In this case, the Respondent school district that had directly experienced the consequences of employee arson, according to the testimony of the Superintendent, would be required first to determine that the Petitioner had a history of criminal arson, and then be required to continue his employment. Such exquisite forms of torture were clearly never contemplated under the Veterans Preference Act.

The reading I have given the respective provisions of the statutes is the one most consistent with their plainly intended effect and meaning in instances involving the conditional hiring of new veteran employees pending a criminal background check.

---FWK---